

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

YOHANA GONZALEZ,

Defendant and Appellant.

B288771

(Los Angeles County
Super. Ct. No. BA455744)

APPEAL from a judgment of the Superior Court of Los Angeles County. Frederick N. Wapner, Judge. Affirmed in part, vacated in part, and remanded with directions.

FredRico McCurry, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Charles J. Sarosy, Deputy Attorneys General, for Plaintiff and Respondent.

In a single-count information filed by the Los Angeles County District Attorney’s Office, defendant and appellant Yohana Gonzalez was charged with one count of second degree robbery (Pen. Code, § 211).¹ It was further alleged that defendant had previously suffered one serious felony conviction (§ 667, subd. (a)(1)), which also constituted a prior prison term conviction (§ 667.5, subd. (b)) and a “strike” within the meaning of the “Three Strikes” law (§§ 667, subd. (d), 1170.12, subd. (b)).

A jury found defendant guilty of second degree robbery. After striking the prior conviction “strike” and prior prison term conviction, the trial court sentenced defendant to a total term of seven years in prison, comprised of two years for the robbery count and one five-year serious felony enhancement pursuant to section 667, subdivision (a)(1).

On appeal, defendant argues that the trial court failed to conduct a bench trial on the prior conviction allegation before sentencing. The People concede—and we agree—that the record does not indicate either that a trial to prove the prior conviction was ever conducted or that defendant waived her right to such a trial and admitted the truth of the prior conviction.

Accordingly, we vacate the imposition of the five-year serious felony enhancement and remand the matter to the trial court, where the prosecution may seek to try the prior conviction allegation and defendant may raise a speedy trial objection. We otherwise affirm the judgment.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Robbery

While Oralda Lopez (Lopez) was walking down the street from the laundromat on March 22, 2017, defendant appeared and took Lopez's cell phone out of her back pocket. Defendant left with the phone, but Lopez followed her, "demanding . . . to get [her] phone back." Lopez struggled with defendant for the phone during three separate encounters. Defendant struck Lopez, causing injuries to Lopez's hand and forehead. Lopez was able to retrieve her phone when defendant dropped it while trying to place it in her bra.

As defendant "walked [away] very fast[,]" Lopez called 911. Paramedics arrived, tended to Lopez's injuries, and walked her home. Los Angeles Police Department Officer Brian Lee responded to a radio call and met Lopez in front of her home. Lopez described defendant to Officer Lee as "[a] female Hispanic wearing a black sweater and carrying a backpack."²

Lopez left her home again shortly thereafter with her son to try to locate defendant. She returned to where she had been attacked and found a package of papers that defendant had dropped during one of the struggles. The package contained an identification card with defendant's picture on it, which Lopez took to the police station.

Lopez then went to a nearby park to continue looking for defendant. Lopez saw defendant at the park and called the police; when the police arrived, she identified defendant as the woman who had attacked her. Officer Lee arrived at the park

² Lopez had previously incorrectly identified defendant as "Afro American" on the 911 call.

and saw defendant—“a female Hispanic . . . wearing a black sweater”—detained by other officers. Officer Lee and his partner arrested defendant.

II. Trial on the Charged Offense and Sentencing

The information charged defendant with one count of second degree robbery (§ 211) and further alleged that she had suffered a prior conviction for “PC649.9(B)/245(A)(1)” in 2014. Section 245, subdivision (a)(1), concerns assault with a deadly weapon or instrument other than a firearm; “section 649.9” does not exist. This prior conviction allegedly constituted a prior serious felony conviction (§ 667, subd. (a)(1)), a prior prison term conviction (§ 667.5, subd. (b)), and a “strike” (§§ 667, subd. (d), 1170.12, subd. (b)).

At trial, the prosecution called Lopez and Officer Lee as witnesses. The defense rested without calling anyone to testify. After the jury indicated that it had reached a verdict on the robbery count,³ the following colloquy between the trial court and defendant occurred:

“[THE COURT]: If the jury finds you guilty, then you have the right to have them, the same jury, decide if your prior convictions are true. The prior convictions are the strike, the allegation . . . that that same strike . . . could add five years under a different Penal Code section and that you went to prison for that same strike. Do you understand that? You have the right to have a jury decide those questions?

“[THE DEFENDANT]: Yes.

³ The trial court had previously granted defendant’s motion to bifurcate determination of the prior conviction allegation from the trial on the charged robbery.

“[THE COURT]: Do you want me to decide them without the jury?

“[THE DEFENDANT]: Yes.”

On August 31, 2017, the jury found defendant guilty of second degree robbery. The trial court asked defense counsel which date he preferred for sentencing, “[p]ending court trial on the prior.” Defendant agreed that the bench trial on the prior and sentencing could take place on or within 30 days of October 4, 2017.

Defense counsel requested—and the trial court granted—continuances on October 4, 2017; November 14, 2017; and January 4, 2018. On February 21, 2018, the court ordered another continuance, with the minute order indicating that the next scheduled event on March 8, 2018, would be a “court trial on priors/P & S” (capitalization omitted).⁴

According to the minute order from the March 8, 2018 hearing, the “case [was] called for court trial on priors/P & S” (capitalization omitted). However, neither the minute order nor the reporter’s transcript indicates that the trial court actually conducted a trial on the prior. Nevertheless, the court, the prosecutor, and defense counsel proceeded as if the truth of the prior conviction allegation had been formally determined. The court stated that the matter was “here for sentencing[,]” and defense counsel agreed that “[n]o legal cause” precluded the pronouncement of judgment.

The trial court struck the prior conviction as a “strike” under the “Three Strikes” law and as a prior prison term

⁴ The record before us does not contain a reporter’s transcript of the February 21, 2018 hearing.

conviction. The court explained that defendant fell “wholly outside the scope of the “Three Strikes law based on, primarily, the conduct in this case.” The court sentenced defendant to the low term of two years for the robbery count and imposed a five-year serious felony enhancement pursuant to section 667, subdivision (a)(1),⁵ for a total term of seven years in prison.

Defendant timely appealed.

DISCUSSION

I. The Failure to Conduct a Trial on the Prior Conviction Allegation Violated Due Process.

Under section 1025, a criminal defendant is entitled to a jury trial or, if a jury is waived, a bench trial on the truth of a prior conviction allegation. Because the statute creates a liberty interest, the Due Process Clause of the Fourteenth Amendment applies. (See *People v. Monge* (1997) 16 Cal.4th 826, 833, *aff’d sub nom. Monge v. California* (1998) 524 U.S. 721.) “[D]ue process requires . . . ‘an opportunity to challenge the accuracy and validity of the alleged prior convictions.’ [Citations.]” (*People v. Cross* (2015) 61 Cal.4th 164, 173.)

⁵ Senate Bill Number 1393 (2017-2018 Reg. Sess.) (SB 1393), effective January 1, 2019, amended section 667, subdivision (a), and section 1385, subdivision (b), to give trial courts discretion to strike the imposition of a five-year sentencing enhancement for a prior serious felony conviction. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) Because defendant was sentenced before SB 1393 became effective, the trial court had no discretion at the time of sentencing to strike this enhancement. SB 1393, however, applies retroactively to nonfinal judgments of conviction where a serious felony enhancement was imposed at sentencing. (*People v. Garcia, supra*, at pp. 971–972.)

Here, while defendant waived her right to have a jury try the prior conviction allegation, she did not waive her right to a bench trial and did not admit the truth of the prior conviction. But she was denied the trial to which she was entitled, and the trial court made no express finding as to the truth of the allegation before sentencing her as if it had been proven true. The sentence cannot stand.

II. The Serious Felony Enhancement Must Be Vacated and the Matter Remanded to the Trial Court.

Although the parties agree that the record does not indicate that the trial court ever held a trial on the prior conviction allegation or that defendant waived that right and admitted that she had suffered the prior conviction, they disagree as to the proper remedy. Defendant contends that the prior conviction should be dismissed based on the violation of defendant's right to due process or, alternatively, the violation of her right to a speedy trial. The People argue that the matter should be remanded "to allow the prosecutor to prove the prior conviction allegation if she so chooses[.]" and acknowledge that the court now has the discretion under SB 1393 to strike a serious felony enhancement. The People further argue that the issue of whether defendant's right to a speedy trial has been violated is not ripe for judicial review and, in any event, is meritless.

Defendant provides no authority for the position that the prior conviction allegation must be dismissed based on the due process violation alone. We therefore consider this contention forfeited based on the failure to present cogent supporting legal authority or argument. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793 [a court may treat as waived a point in a brief made without reasoned argument or authority].)

We agree with the People that defendant’s speedy trial argument is not ripe for review, as the pertinent “. . . facts have [not] sufficiently congealed to permit an intelligent and useful decision to be made.” (*Vandermost v. Bowen* (2012) 53 Cal.4th 421, 452.) Accordingly, we decline to address it on the merits at this juncture. If the People seek to try the prior conviction allegation and an objection is raised by defendant, the trial court must determine in the first instance whether a violation of the speedy trial right has occurred.

DISPOSITION

The five-year serious felony enhancement under section 667, subdivision (a)(1), is vacated. We remand the matter to the trial court, where the prosecution may seek to try the prior conviction allegation and defendant may raise a speedy trial objection. If the allegation is tried and found true, the court may exercise its discretion under SB 1393 to strike the enhancement. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT